

NO. 45641-9-II

COURT OF APPEAL OF THE STATE OF WASHINGTON
DIVISION II

LYSANDRA NESS,

Appellant,
v.

JIAN SONG,

Respondent.

APPELLANT'S BRIEF

Appeal from the Superior Court
Of Pierce County, Washington
The Honorable Stephanie A. Arend

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PM 5-7-14

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I. Introduction

This is an appeal from the court granting a defense motion for summary judgment and the Court denying the plaintiff's motion for order to reconsider.

II. Assignments of Error

1. The Court have granted summary judgment motion of defendant after refusing the consider plaintiff's pleadings.
2. The Court would not reconsider its prior ruling and consider plaintiff's pleadings for motion to reconsider.

Issues Pertaining to Assignments of Error

1. When the Court granted summary judgment motion by the defendant, should the Court have, prior to granting the order, considered the pleadings filed by plaintiff, even though the pleadings were filed late? If the Court had considered the plaintiff's pleadings would the Court have granted summary judgment?
2. When the Court would not reconsider its prior ruling and refused to consider plaintiff's pleadings regarding the

motion to reconsider should the Court have summarily refused to consider plaintiff's pleadings? If the Court had considered plaintiff's pleadings would the Court have reversed its prior ruling and considered plaintiff's original responsive pleadings and denied the defendant's motion for summary judgment?

III. Statement of the Case

On October 3rd defendant filed motion for summary judgment. CP 1-12. Attached to the Defendant's motion was a declaration of the defendant, Jian Song (CP 22-28) and a declaration of Robert Mannheimer. CP 13-21. The hearing on defendant's motion for summary judgment was set for November 8, 2013. Plaintiff filed it's response on November 4. CP 32-44. Attached to plaintiff's response were the affidavits of Jim Harris, Sheena Hudson and Susan Montez. CP 45, 46, 47, 48, 49. Plaintiff filed an additional declaration of Ronald D. Ness on November 7th. CP 66-67. The hearing was held on November 8th and the Court granted defendant's motion for summary judgment. RP November 8th, page 7, CP 68-70.

Plaintiff filed a motion to reconsider the Court's order granting summary judgment on November 18th. CP 29-31. Defendant filed opposition to motion to reconsider on November 26th. CP 95-103. The hearing on the motion to reconsider was held December 13th and Court denied the motion. CP 107, RP December 13th, page 4. Notice of Appeal to the Court's orders was timely filed on December 2nd.

Factual Background Regarding Service:

The plaintiff filed this action in Pierce County Superior Court on April 25, 2013. Subsequent to filing the action, plaintiff retained private investigator, James Harris, to serve the summons and complaint on Jian Song. CP 45-46. The address that was provided to plaintiff for Mr. Song was 1502 N. Steele Street Apt. C in Tacoma, Washington. This address was provided in the police traffic collision report and was the address for the registered owner information for a 1997 Toyota Land Cruiser. CP 32-44. (Exhibit A, line 6 and line 13 and 14). Mr. Harris attempted to serve Mr. Song at the address of 1502 N. Steele Street. He was advised by the resident there that Song

no longer lived at that address. (CP 45, line 21, 22 and 23). Mr. Harris advised plaintiff attorney's office of the fact that the defendant, Mr. Song, no longer lived at that address. CP 45-46. At that point the plaintiff contacted private investigator Susan Montez and requested she locate an individual named Jian O. Song. Mrs. Montez, through her search, came up with an address of 13214 SE 252nd Street, Covington, Washington. CP 48-49. Mr. Harris attempted to serve at the Covington address three times, but was unable to locate any individual and it appeared that the house was vacant. On the third attempt he left his business card with contact information on it. CP 45-46.

After being unable to serve Mr. Song personally, plaintiff then placed a copy of the summons and complaint in the mail to Mr. Song at both addresses that were believed to be Mr. Song's and proceeded to do service by publication as provided in RCW4.28.100. CP 47.

IV. Summary of Argument

Defendant alleged Plaintiff failed to effectuate proper service by publication because Plaintiff failed to conduct a

diligent search to locate the defendant. CP 1-12. Plaintiff responded with the affidavit of James Harris outlining the number of times personal service was attempted and the failure to locate defendant. CP 45-46. Sheena Hudson, Plaintiff attorneys legal assistant outlined the method undertaken to serve defendant. CP 47. Susan Montez also provided a declaration indicating the search for the address of defendant. CP 48-49. Plaintiff's position is that service was proper based on the affidavits provided. The judge should have considered plaintiff's pleadings in determining whether or not summary judgment should be granted.

V. Argument

STANDARD OF REVIEW

1. "The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court." *American States Insurance Company v. Symes of Silverdale, Inc.*, 150 Wash.2d 462, 78 P.3d 1266 (November 2003). *Mutual of Enumclaw Insurance Company v. USF Insurance Company*, 137 Wash.App. 352, 153 P.3d 877

(February 2007) further states “Summary judgment orders are reviewed de novo and are proper if, after reviewing all the documents on file, there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. All facts and inferences are viewed in a light most favorable to the nonmoving party. Summary judgment is proper when reasonable persons could only reach the conclusion that the nonmoving party is unable to establish any facts that would support an essential element of its claim.”. Page 358, 359. In order for jurisdiction to attach when a summons is served by publication, there must be strict compliance with the statute. RCW 4.28.100 outlines the procedure that is to be undertaken when service is accomplished by summons by publication. *Longview Fibre Company v. Stokes*, 52 Wash.App. 241, 758 P.2d 1006 (March 1993). The key language in *Longview Fibre Company* is that the plaintiff must have made an honest and “reasonable effort” to find the defendant. The plaintiff here undertook all the steps as indicated in the affidavits provided to the Court and outlined in the declarations of James Harris,

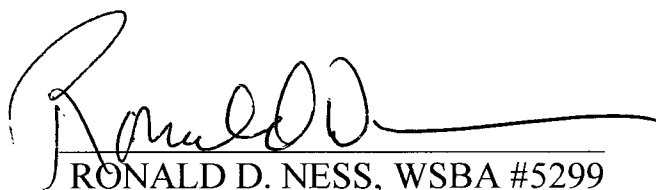
Susan Montez and Sheena Hudson. The focus of the Court should be on what reasonable steps the plaintiff took in light of what was known to the plaintiff and not on other steps that were possible. See *Boes v. Bisiar*, 122 Wash.App. 569, 94 P.3d 975 (July 2004). The Court is to consider all of the affidavits that were filed regarding this issue in this matter. However, the trial court did not do so even though it would be necessary to make a complete review by the Court.

2. The plaintiff filed a motion to reconsider the Court's order granting summary judgment requesting that the court consider all of plaintiff's affidavits as required by *Boes, supra*. The Court once again declined to consider the plaintiff's affidavits and denied the motion to reconsider. VRP page 4. The declaration filed by plaintiff's attorney, Ronald Ness, (CP 66-67) outlines a valid reason for the late filing of the response and declarations attached to that response. The Court should have considered all of the pleadings before making a decision regarding the summary judgment.

VI. Conclusion

This Court should consider all of the pleadings filed by both parties in this matter and make a determination, based on those pleadings, whether a summary judgment was the appropriate remedy under the facts. Summary judgment was not an appropriate remedy because Plaintiff complied with all of the requirements of the statute and the case law.

Respectfully Submitted this 7th day of May, 2014.

A handwritten signature in black ink, appearing to read "Ronald D. Ness", with a long horizontal flourish extending to the right.

RONALD D. NESS, WSBA #5299
Attorney for Appellant

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3 **IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
4 **DIVISION II**
5

6 **LYSANDRA NESS,**)

7 **Plaintiff/Appellant,**)

8 **vs.**)

9)
10 **JIAN SONG and JANE DOE SONG,**)
11 **husband and wife and the marital community**)
12 **thereof,**)

13 **Defendant/Respondent.**)
14 _____)

Case No.: 13-2-08604-8

Court of Appeals No.: 45641-9-II

AFFIDAVIT OF MAILING

15 STATE OF WASHINGTON)

16 :
17 COUNTY OF KITSAP)

18 The undersigned, being first duly sworn on oath, deposes and states:

19 That on the 7th day of May, 2014, affiant filed with the Court of Appeals and deposited in the
20 mails of the United States of America, a properly stamped and addressed envelope directed to:

21 Court of Appeals
22 Division II
23 950 Broadway, Suite 300
24 Tacoma, WA 98402-4454

Robert Manheimer
Attorney at Law
9500 Roosevelt Way NE; Suite 303
Seattle, WA 98115-2253


25
26 Containing a copy of the Appellant's Brief.
27
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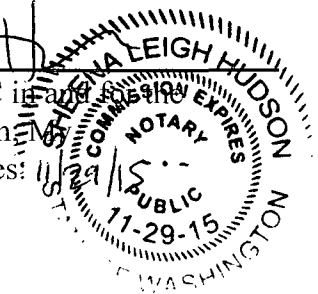
29 
30 TRICIA BOYES
31
32

AFFIDAVIT OF SERVICE BY MAIL...1

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SUBSCRIBED AND SWORN to before me this 7th day of May, 2014.


NOTARY PUBLIC in and for the
State of Washington
Commission Expires: 11/29/15



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